Supreme Court, U.S.
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88-977

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

APPENDIX TO JURISDICTIONAL STATEMENT
(Volume 2 of 2)

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December 14, 1988

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(Decision No. C83-1176)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE	)	CASE NO. 6076
INVESTIGATION OF THE	)	
SCHEDULES ACCOMPANYING	)	ORDER OF THE
ADVICE LETTER NO. 45,	)	COMMISSION
FILED BY COLORADO-UTE	)	ESTABLISHING
ELECTRIC ASSOCIATION, INC.	)	RATE STRUCTURE

- - - - - - - - - - -

July 26, 1983

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STATEMENT

BY THE COMMISSION:

I.

HISTORY OF THE PROCEEDINGS

On December 15, 1981, Colorado-Ute Electric Association, Inc. (Colorado-Ute), filed with the Commission its Advice Letter No. 45. The purpose of the advice letter was to increase Colorado-Ute's annual revenues from its fourteen all-requirements members by approximately $11,120,603, or 12.157 percent. On January 12, 1982, the Commission entered Decision No. C82-75 whereby it established Case No. 6076 for the purpose of investigating the schedules filed by Colorado-Ute pursuant to its Advice Letter No. 45. As a result of amendments to CRS 1973, 40-3-102 and 40-6-108(1) and (2), the Commission may, at its discretion, set tariffs filed by an electric cooperative, such as Colorado-Ute, for hearing, and thereafter establish such rates, fares, tolls, rentals, charges, classifications, practices, rules, or regulations proposed, in whole or in part, or others in lieu thereof, which it finds just and reasonable. As a result of amendment to CRS 1973, 40-6-111, the Commission no longer has the authority to suspend

rates filed by electric cooperative associations. However, cooperative electric associations, such as Colorado-Ute, are not exempt from the other provisions of 40-6-111.[1]

The following parties were granted permission to intervene: San Luis Valley Rural Electric Cooperative ("San Luis Valley") by ER No. 82-38 dated February 2, 1982; Yampa Valley Electric Association, Inc. ("Yampa Valley") by ER No. 82-52, dated February 17, 1982; Intermountain Rural Electric Association ("Intermountain") by ER No. 82-53 dated February 17, 1982; Cheryl Muhovich by ER No. 82-54 dated February 17, 1982; White River Electric Association, Inc. ("White River") by ER No. 82-55, dated February 17, 1982; San Isabel Electric Association ("San Isabel") by ER No. 82-56, dated February 17, 1982; Sangre de Cristo Electric Association, Inc. ("Sangre de Cristo") by ER NO. 82-69, dated February 23, 1982; Grand Valley Rural Power Lines, Inc. ("Grand Valley") by ER No. 82-70 dated February 23, 1982; Delta-Montrose Electric Association, Inc. ("DMEA") and Holy Cross Electric Association ("Holy Cross") by Decision No. R82-292-I, dated March 12, 1982; Empire Electric Association, Inc. ("Empire"), City of Delta, Colorado, and Union Carbide Corporation by Decision No. R82-445-I, dated March 26, 1982; Western Slope Energy Research Center and Western Colorado Congress by Decision No. R82-545-I dated April 15, 1982; Shell Oil

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[1] Senate Bill 224, which became effective July 1, 1983, authorizes distribution rural electric cooperative associations to exempt themselves from this Commission's regulatory jurisdiction (subject to certain qualifications) upon vote of the members of such rural electric cooperative association. However, generation and transmission electric cooperative associations, such as Colorado-Ute, are not exempted or potentially exempted, by the provisions of Senate Bill 224.

Company by ER No. 82-263 dated July 9, 1982; San Miguel Power Association ("San Miguel") by Decision No. C82-1281 dated August 17, 1982; Exxon Company, U.S.A. by Decision No. C82-1439 dated September 14, 1982. Atlantic Richfield Company and Southeast Colorado Power Association ("Southeast") were granted permission to intervene by Commission order from the bench on October 6, 1982. Western Colorado Congress and Western Slope Energy Research Center were granted permission to withdraw as intervenors by ER No. 82-422 dated November 10, 1982.

Hearings were held before the Commission on October 6, 7, 8, 25, 26, November 15 and 16, 1982. Colorado-Ute sponsored the testimony of the following witnesses in its case in chief: Mr. Girts Krumins, Mr. Gene M. Harris, Mr. Robert J. Walker and Mr. Steven M. Foss; Intervenor DMEA presented the testimony of Messrs. Armstrong, Potter and Bussing; Intervenor White River presented testimony of Mr. Holeyfield; Intervenor Grand Valley presented testimony of Mr. Letey; Intervenor Sangre de Cristo presented testimony of Mr. Knudsen; Intervenor Holy Cross presented testimony of Mr. Grange; Intervenor Yampa Valley presented testimony of Mr. Golden; Intervenor Intermountain presented testimony of Mr. Lewandowski; Intervenor San Isabel presented testimony of Mr. Wood; Intervenor Southeast presented testimony of Mr. Bailey; and Intervenor San Luis Valley presented testimony of Mr. Sheppard. Public testimony was given by Messrs. Christenson, M. J. Mitchell, Moe, Myers, Felmlee, Walton, and Gosar. In its direct case, the Staff sponsored the testimony of Dr. William Loehr, Mr. Garrett Fleming, Mr. Warren Wendling and Mr. Bruce Mitchell. Colorado-Ute called the following witnesses on rebuttal: Messrs. Krumins, Harris, Pierson and Keith. The Staff called Mr. Wendling and Mr. Mitchell on

surrebuttal.[2] At the conclusion of the hearing, the subject matter was taken under advisement.

Submission

The herein instant matter has been submitted to the Commission for decision. Pursuant to the provisions of the Colorado Sunshine Act of 1972, CRS 1973, 24-7-401, et seq., and Rule 32 of the Commission's Rules of Practice and Procedure, the subject matter of this proceeding has been placed on the agenda for an open meeting of the Commission. At an open meeting, the herein Decision was entered by the Commission.

II.

JURISDICTION

On August 27, 1982, one of the Intervenors herein, namely, Intermountain, filed a "Motion of Intermountain Rural Electric Association to Dismiss for Lack of Jurisdiction." Intermountain, in essence, stated that this Commission does not have authority over the wholesale rates of Colorado-Ute because such authority would not be a constitutionally valid application of CRS 1973, 40-3-101, et seq., (which grants this Commission jurisdiction to regulate utility rates generally) in light of the commerce clause of Article 1, Section 8 of the United States Constitution. Oral argument on Intermountain's Motion to Dismiss was held on October 8, 1982, at the conclusion of the presentation of Colorado-Ute's direct case.

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[2] A list of exhibits which were tendered and admitted is attached to this decision as Appendix A.

The Commission will not burden the decision herein with extensive discussion of the jurisdictional issue. Suffice it to say that the Commission herein determines that it has regulatory jurisdiction over Colorado-Ute based upon the following three major propositions:

1. In Western Colorado Power Company v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785 (1966), the Colorado Supreme Court specifically held that Colorado-Ute was a "cooperative electric association" subject to the jurisdiction, control and regulation of this Commission. The Western Colorado Power case has never been modified or overruled by the Colorado Supreme Court. This Commission, in fact, has exercised regulatory jurisdiction over Colorado-Ute since 1961 when the Colorado Public Utilities Law was amended to specifically provide that, "every cooperative electric association is a public utility . . . subject to the jurisdiction, control and regulation of the commission and to the provisions of articles 1 to 7 (of the public utilities law)."

2. In its recent consideration of Senate Bill 224, the Colorado General Assembly had occasion to consider whether or not to exempt Colorado-Ute from the jurisdiction of this Commission. As initially proposed, Colorado-Ute would have been exempted by the provisions of Senate Bill 224 from the jurisdiction of this Commission. However, as finally enacted, Senate Bill 224 specifically excluded from its operation non-profit generation and transmission electric corporations or associations. Thus, it can be concluded the Colorado General Assembly desires that this Commission's jurisdiction of Colorado-Ute be continued.

3. Finally, on May 16, 1983, in the case of Arkansas Electric Cooperative Corporation v. the Arkansas Public Service

Commission, the United States Supreme Court, in a 7 to 2 decision, held that the Arkansas Public Service Commission's assertion of jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation to its members offends neither the Supremacy Clause nor the Commerce Clause of the United States Constitution. This Commission views the Arkansas case as "on all fours" with the situation involving Colorado-Ute in that the Arkansas Electric Cooperative Corporation is a customer-owned rural power cooperative, established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA) and which, like Colorado-Ute, does not provide power directly to consumers, but rather to its members who are seventeen smaller Arkansas rural power cooperatives which in turn serve the ultimate consumers. Although Arkansas Electric Cooperative Corporation is tied into an interstate "grid" arrangement with other producers, it obtains most of its energy from power plants located in Arkansas, which it wholly or partially owns, and sells most of what it generates to its member cooperatives. The basic fact pattern involving Colorado-Ute is not only substantially similar, but almost totally so. In a vein similar to that of the United States Supreme Court in the Arkansas case, neither the Federal Power Act of 1935, nor the Rural Electrification Act in 1936, pre-empts this Commission's regulatory jurisdiction over Colorado-Ute. Likewise we find that our in-state regulation of Colorado-Ute does not interfere with or impose unconstitutional burdens on interstate commerce.

Premises considered, this Commission states and finds that Intermountain's Motion to Dismiss for Lack of Jurisdiction should be denied.

III.

FINANCIAL ISSUES

A. Expense of Energy Delivered to Western Area Power Administration (WAPA)

In its income statement, Colorado-Ute reduced its operating expenses by $233,948, which was the value which it had assigned to energy delivered to Western Area Power Administration (WAPA) in lieu of a wheeling fee for non-members. In order to determine the proper value of energy delivered by Colorado-Ute to WAPA, the Staff reversed Colorado-Ute's adjustment of $233,948 by adding back that amount to the operating expenses on the income statement. In his cost of service study, Staff witness Wendling then adjusted the annual kwh billed to non-member sales by adding in the energy supplied to WAPA. The resulting annual kwh are utilized in the average and excess demand methodology of the cost of service study. The Staff contends that the proper expense of the energy delivered to WAPA in lieu of a wheeling fee is included in the total expense of $12,778,916 which the Staff's cost of service study indicated was attributable to non-member sales.

Colorado-Ute witness Harris contended that Staff witness Fleming's treatment of the $233,948 as an additional adjustment to Colorado-Ute's cost was inappropriate in that this amount has already been expensed as a cost in the books and records of Colorado-Ute to account 555 Purchased Power, interchanged on a monthly basis as the expense was incurred. Colorado-Ute witness Harris contends that Fleming's methodology has, in fact, doubled the expense by including it again. Colorado-Ute witness Harris contended that the only

treatment that would have been proper was to allocate this expense to non-member sales as a cost. The Commission states and finds that the Staff adjustment of the $233,948 was, in fact, improper and, accordingly, we do not adopt it.

B. Interest Expense Adjustment

The Staff made an adjustment to Colorado-Ute's income statement to reduce interest expense by $2,649,321. One component of this adjustment is a reduction of $1,430,983 equal to the annualized interest cost by the amount of the annualized interest income on a note from Mack Fuel Supply, Inc., held by Colorado-Ute. Another component is an [sic] reduction of $185,663 equal to the amount of the capital costs associated with the equity investment in Mack Fuel. A third component is a reduction of $1,032,675 equal to the annualized interest cost by the amount of the annualized interest expense associated with investment for preliminary survey and investigation purposes. A final component is a reduction in annualized interest cost by $201,883 which was made by Colorado-Ute and accepted by the Staff.

Mack Fuel Supply, Inc. is a partially owned subsidiary of Colorado-Ute engaged in the exploration and extraction of mineral resources, primarily coal. Colorado-Ute appears to agree with the Staff that neither the revenues earned nor the expenses incurred by Colorado-Ute from Mack Fuel operations should be considered for ratemaking purposes, since the operations of Mack Fuel are not those of a public utility and therefore not subject to the jurisdiction of the Commission. Colorado-Ute's members and ultimately their retail customers should not incur non-utility expenses such as interest expenses through the rates they pay. It is necessary to eliminate all non-utility expenses in order to calculate the proper Times

Interest Earned Ratio (TIER) which is used to gauge the reasonableness of revenue increases.

Colorado-Ute and the Staff agree that the interest income on a note from Mack Fuel to Colorado-Ute should be eliminated from Colorado-Ute's annualized interest cost. However, Colorado-Ute and the Staff disagree on the methodology for making that adjustment. The Staff first determined the annualized interest expense on total debt outstanding and then subtracted the annualized interest income on the note from Mack Fuel. Colorado-Ute also determined the same annualized interest expense on total debt outstanding but credited the actual interest income on the note from Mack Fuel to booked interest expense and then proceeded to add and deduct booked interest expense in deriving its adjusted annualized interest for ratemaking purposes. Colorado-Ute's methodology is incorrect for two reasons. First, the process of subtracting out and then adding back in the same booked interest income figure results in a wash and does not eliminate the Mack Fuel interest income from the adjusted interest expense. Second, the adjusted annualized interest expense must be calculated based upon the annualized interest income, and not the booked interest income, of the note from Mack Fuel. The note receivable from Mack Fuel is an asset on the balance sheet. Each asset must be supported by either liabilities such as debt or retained margins. Colorado-Ute updated its liabilities to year-end by using year-end total outstanding debt in its interest adjustment. To maintain a matching relationship, Colorado-Ute must also update its assets, including the Mack Fuel note, to year-end figures. Therefore the interest income on the Mack Fuel note which is based upon the year-end figure is annualized interest.

The Staff contends, and we agree, that the adjustment to interest expense to eliminate the capital cost supporting the equity investment in Mack Fuel is also proper for the reasons explained above. Mr Fleming testified that as of October 31, 1981, Colorado-Ute had a negative balance in the margin account on the balance sheet. In his opinion, if Colorado-Ute had not made the investment in Mack Fuel, the amount of debt necessary to cover negative margins would have been reduced. It is the Staff's position that debt supports the long-term investment in Mack Fuel since Colorado-Ute had no retained margins to provide cost-free funds. Even if Colorado-Ute had accumulated positive margins in excess of the investment in Mack Fuel, it is the Staff's position that an adjustment would still be necessary because it is unfair to allow non-utility investments to be made with cost-free funds while requiring utility ratepayers to pay high interest costs on debt-financed investments dedicated to utility service. Colorado-Ute witness Harris testified on rebuttal that the Staff's proposed interest adjustment for the equity investment in Mack Fuel should not be allowed. Mr. Harris' sole reason was that "Colorado-Ute has not associated or booked any interest expense for this investment on its books and records and therefore a credit adjustment as proposed by Mr. Fleming is not warranted". This statement misses the point that Colorado-Ute should have associated or booked such an interest expense (or made an adjustment for ratemaking purposes) for the reasons stated above.

Mr. Fleming also recommended that interest costs be reduced by the amount of interest costs associated with investment for preliminary survey and investigation (PS&I) purposes and that these charges be removed from rate base. It has been this Commission's practice to exclude PS&I charges from the investment base upon which a utility is allowed to

earn because these investments are not used and useful in providing utility service. Mr. Fleming testified that numerous projects in the PS&I account have either been dropped from Colorado-Ute's long range plan, rejected by the Commission in a CPCN application, or have not been submitted to the Commission for a CPCN. PS&I charges can be compared to research and development costs for competitive companies. Research and development costs are not recovered by competitive companies unless they result in a marketable product, and then only after sales of that product begin. The possibility that these expenses will never be recaptured, along with the delay between the expenditure of these costs and their recovery, necessitate that management carefully scrutinize such expenditures prior to their incurrence. No such constraints exist for Colorado-Ute if the Commission adopts Colorado-Ute's position that the interest expense for PS&I charges is a proper ratemaking expense. All risk of such expenses would be borne by the ratepayer, with no constraints on management. The position recommended by the Staff shifts the risk to management.

We also agree with the Staff that non-operating margins, except the loss on the equity investment in Mack Fuel, should be included in the calculation of Colorado-Ute's TIER and that amounts spent on sponsorships, donations, and political and civic activities should be removed from operating deductions. The Staff pro forma income statement for fourteen member operations is shown in the last column of Exhibit 45, Schedule 2, page 1. The Staff pro forma year-end rate base for fourteen member operations is shown in the last column of Exhibit 45, Schedule 3, page 1.

C. Times Interest Earned Ratio (TIER)

The Staff has recommended that the Commission approve the total revenue increase requested by Colorado-Ute herein. During the case, the Staff's calculation of the adjusted TIER achieved by Colorado-Ute on its member sales for the test year was .93. The requested revenue increase, as originally calculated by the Staff, would produce a TIER of 1.30. However, as a result of our not adopting Staff witness Fleming's adjustment to operating expenses with regard to energy delivered to WAPA, the recalculated TIER would be 1.31. We find that this TIER is reasonable under current circumstances and will provide Colorado-Ute with a margin of safety in meeting its indenture requirements.

The use of TIER to establish revenue requirements is primarily a function of utility liabilities. The determination of revenue requirements for other regulated utilities is primarily a function of utility assets. If TIER is used to determine revenue requirements, then the assets supported by debt should always be reviewed. The non-utility assets should be identified and the cost of debt supporting these assets should be eliminated from the TIER calculation. The failure to do this places the burden of supporting non-utility investments on the ratepayers.

In the past, this Commission has found that a TIER of 1.92 was reasonable for Colorado-Ute. We now believe that the 1.92 TIER should no longer be considered the benchmark for future decisions. A TIER which is adequate at one point in time may be either inadequate or excessive at some other time.

Mr. Fleming's Exhibit 45, Schedule 5, page 3, shows that a TIER of 1.92 applied to four different sets of circumstances for Colorado-Ute will result in operating ratios ranging from .87 in I&S Docket No. 1050 when that TIER was established to .72 if the investment in Craig 3 is classified as plant in service. The operating ratio of .87 would allow Colorado-Ute to increase expenses equal to 13 percent of revenues. The operating ratio of .72 would allow Colorado-Ute to increase expenses equal to 28 percent of revenues. The same TIER results in a rate of return on rate base of 7.04 percent in I&S Docket No. 1050 and 18.36 percent if the Craig 3 investment is included in rate base. Moreover, the regulatory climate has changed since the 1.92 TIER was established in I&S Docket No. 1050. Since that case, we have allowed Colorado-Ute to use year-end amounts in calculating the TIER and return on rate base, and regulatory lag has been significantly reduced with the passage of House Bill 1444. Because of these changed circumstances we believe that 1.92 TIER is no longer appropriate and that a reasonable TIER should be established on a case-by-case basis.

Mr. Krumins testified in Colorado-Ute's direct case, and Mr. Harris testified on rebuttal, that the Commission should establish a reasonable range for the TIER. They recommended the range of 1.5 to 3.0. Mr. Harris testified that this range was approved by Colorado-Ute's board of directors in August 1981 as a means to insure the financial integrity of Colorado-Ute. Colorado-Ute's proposal to use a range conforms to the Staff's position that the determination of TIER requirements should provide latitude to recognize Colorado-Ute's internal and external operating environment. However, Colorado-Ute has not demonstrated that the 1.5 to 3.0 range is reasonable. None of the distribution cooperatives listed in Exhibit 45, Schedule 6, page 1, have attained a TIER of 1.50. All of

these cooperatives are listed in Mr. Krumins' Exhibits 4 and amended 4 as having bonds rated in the A or AA class and therefore are viewed in a favorable light by rating agencies. In addition, Colorado-Ute has requested a revenue increase in this case which produces a TIER below the bottom of its recommended range. Thus, we do not find it necessary to announce a 1.5-3.0 TIER range for this case or future cases at this time.

IV.

COST OF SERVICE AND RATE DESIGN

It is obvious from the record that cost of service and rate design were the most hotly contested issues in this proceeding. The only cost of service study supplied in this docket was performed by the Staff of the Commission and was marked as Exhibit 58 and admitted into evidence. Colorado-Ute Electric Association did not submit a cost of service study. Colorado-Ute's President, Mr. Krumins testified that the flat energy rate is the appropriate rate design for the wholesale power which it supplies its member systems because Colorado-Ute's costs do not vary over time. Consequently, Colorado-Ute did not believe that it was necessary to file a cost of service study in the instant proceeding.

In Decision No. C81-373, issued February 24, 1981, the Commission approved the replacement of Colorado-Ute's then existing demand and energy rate schedules with rates providing for an equal and uniform energy charge per kilowatt hour to be applied to all energy purchased (Exhibit 5). The uniform or flat energy charge was designed to reflect average or per unit costs which, of necessity, include demand and energy costs. The resulting rate charged by Colorado-Ute has been

characterized in this proceeding as a "flat energy rate", an "energy-conservation rate", and "unit pricing". The flat rate structure has been in effect for all sales to the members of the Colorado-Ute system since March 1, 1981.

While there was extensive testimony regarding the costs and benefits of demand and energy rates at the retail level, the Commission finds that the scope of this proceeding was limited to a discussion of and an investigation into the justness and reasonableness of the tariffs accompanying Colorado-Ute's Advice Letter No. 45 filed with the Commission on December 15, 1981 and only those tariffs. The tariffs filed by Colorado-Ute relate only to the wholesale power rates charged by it to its members and not the rates charged by the fourteen member distribution cooperatives to their respective end-use customers. The appropriateness or non-appropriateness of employing demand and energy rates for all or some of their retail customers must be determined in proceedings specific to the involved distribution cooperative or cooperatives.[3] The utilization of a particular rate design at the wholesale level

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[3] However, the Commission would state that it has indicated in several orders, particularly its "generic" decision C79-1111, that it believes for particular end-use loads, such as residential and small commercial all electric space heating, a demand energy rate tracks the cost of providing service to them by the cooperative member systems. With regard to a number of rural electric distribution cooperatives, the demand-energy rate requirement is being re-examined in a consolidated hearing (Application No. 35295 and Case No. 5693) which is set to commence on August 11, 1983. Irrespective of the final outcome of those proceedings, however, we believe that is possible for retail distribution cooperatives to provide a reasonable explanation of a demand/energy rate to their individual retail customers.

does not necessarily preclude the selection of a different rate design or various rate designs at the retail level for individual customer classes. The wholesale/retail distinction is significant when viewed in the context of the benefits conferred by the clarity of the price signal provided a consumer through a specific rate design.

The Commission is aware of the rate designs in effect at both the wholesale and retail levels for Colorado-Ute and its member systems. Prior to March 1, 1981, Colorado-Ute sold wholesale power to its member systems via a demand and energy rate; during the same time frame, Colorado-Ute's member systems were charging their retail customers under various rate designs for different classes of service. The rate designs at the retail level included "declining block" rates, which became "two part" (customer charge and uniform energy charge) rates, "demand and energy" rates and "horsepower" rates for irrigation customers. Accordingly, as we have stated above, the selection of one form of rate design at the wholesale level does not necessarily dictate the choice of the use of the same rate form or forms at the retail level.

The Commission agrees with Colorado-Ute that an important, though not exclusive, objective of rate design is to provide a clear price signal that is understood by consumers. Since the consumers of Colorado-Ute's wholesale power are its fourteen member distribution cooperatives whose managers are knowledgeable and experienced in utility matters, a flat-energy rate is not the only rate design that is clearly understandable to Colorado-Ute's direct consumers. To the contrary, we believe that the wholesale customers of Colorado-Ute are quite capable of comprehending a demand and energy rate with a fixed customer charge as proposed by Staff in this proceeding. We agree with the testimony of Dr. Loehr in this regard. The

record in this proceeding does not support the conclusion, as testified to by certain general managers of distribution systems, that Colorado-Ute's wholesale rate design must be paralleled at the retail level for each rate class.

Colorado-Ute witness Krumins contended that the unique characteristics of its system and its resource management plan produce a flat load curve which indicates that its generation costs are uniform over all levels of output. Mr. Krumins testified that Colorado-Ute does not plan or construct generating facilities to meet its annual system peak. In contrast, in Colorado-Ute's last rate case, while under oath in I&S Docket No. 1452, Mr. Krumins advised this Commission that Colorado-Ute did build new plants to meet its system peak (Tr. Jan. 16, 1981, p. 204, ll., 4-7). This also is evidenced by the review of Colorado-Ute's fourteen member systems' individual maximum demands in relation to their contribution to the system peak, as testified to by Staff witness Mitchell. In fact, the generation plant of Colorado-Ute is constructed to provide a reliable source of power whenever the members demand it. Mr. Mitchell testified that for the month of February, 1981, the peak month for the test year filed by Colorado-Ute in this proceeding, approximately ten of the members peaked during the top five percent of the peak hours of the Colorado-Ute system. The coincident nature of the member systems' peaks to Colorado-Ute's system peak is further emphasized since twelve of the fourteen member systems are winter peaking utilities. The relationship between coincidence of peaks to demand-energy rates was explained by Staff witness Loehr who concluded that in those cases involving utilities where peak demand among various loads are highly coincident, a demand-energy rate is appropriate. The Commission finds, based on the factual evidence in this record, that the Colorado-Ute members exhibit a high coincidence of

demand with the Colorado-Ute system peak and that demand-energy rates are appropriate for Colorado-Ute.

In addition to the question of coincidence of peaks, the record contains a lengthy discussion of Colorado-Ute's resource management plan. As indicated above, Colorado-Ute witness Krumins contended that the combination of a flat energy rate and Colorado-Ute's resource management plan have resulted in a uniform cost per unit of output on a monthly basis, the operation of generation units at full capacity and a flat load curve. Exhibit 8, sponsored by Mr. Krumins in this proceeding, makes clear that during the test year total costs varied from 3¢/kwh in January to 4.3¢/kwh in October, a 1.3¢/kwh difference (or 43%); by 1982, the total cost varied from 3¢/kwh again in January to 4.5¢/kwh in June, a difference of 1.5¢ per kwh (or 50%). Therefore, the Commission must conclude from Colorado-Ute's own evidence that the total cost per unit of output has varied monthly.

The question of whether or not a utility system operates its generation units at or near their expected capacity levels is one of great concern to this Commission. The Commission has maintained a consistent policy in favor of the conservation of capital (as well as the conservation of energy). As early as its so-called generic Decision No. C79-1111, the Commission emphasized the need for avoiding unnecessary construction of costly generation facilities through such efforts such as load management, rate design, power pooling and direct conservation. The testimony of Mr. Krumins on "energy conservation" as it relates to rates, and more particularly the flat-energy rate, appears to address the conservation of energy, that is fuel, and not the conservation of capital. Upon questioning by the Commission in this proceeding, Mr. Krumins admitted as much (Tr. Oct. 6, 1982, Vol. IA, p. 101).

The Commission does not agree that there is a necessary and direct relationship between the conservation of energy and capital insofar as the conservation of energy in no way alters the amount of fixed plant already in service. The Commission does recognize that there is a relationship between the conservation of energy and other variable operating costs such as maintenance costs and labor costs. Exhibit 68, sponsored by Staff witness Mitchell, depicts a condition of a definite surplus of base load capacity at certain times which indicates that Colorado-Ute has not achieved uniform loading of capacity throughout the day. This condition results in an uneconomic under-utilization of capacity.

With regard to Colorado-Ute's resource management plan, we find that its effectiveness is not evident and both has contributed and has potential to continue to contribute to a growth in peak demands. The agreement between Colorado-Ute and Southern California Edison (SCE) demonstrates the problem pointedly. Exhibit 55, a letter agreement between Colorado-Ute and SCE, provides that delivery of fifty percent of the energy sold by Colorado-Ute to SCE is to occur during the peak load hours of Colorado-Ute. This can only mean an exacerbation of load requirements at precisely the time that generation plant is most constrained. In addition, Colorado-Ute's annual system load factor has deteriorated in recent years. Staff witness Loehr testified that Colorado-Ute's system load factor, 64.1 percent in 1980, an average load factor by industry standards, had declined to 58.1 percent in 1982, for a decline of 9.3 percent. Furthermore, Dr. Loehr forecasted a continuing decline in Colorado-Ute's system load factor through 1995. According to the testimony of Staff witness Mitchell, Colorado-Ute's load curve is not flat and according to the testimony of Staff witness Wendling, Colorado-Ute has

been unable to make non-member sales to fill in the valleys of its load.

The Commission accepts Colorado-Ute's contention that overall economic conditions, such as the recession and surplus energy in the region, has made it less able to sell energy to non-members so as to use its plants more efficiently. However, the Commission believes that the state of the economy both in the near and long term future as well as consumer response to economic change is imponderable at best. In any event, there was no evidence in the record to substantiate the overly optimistic assertion that economic recovery was just around the corner.

From time to time, it becomes necessary for a utility, such as Colorado-Ute, to meet its own peak demand by purchasing power from another utility, such as Public Service Company of Colorado. The record in the instant case reflects that the cost of such power, which is based on the capacity costs of base load units of the selling utility, Public Service, are as much as five times per kwh greater than the capacity costs associated with peaker units. This fact, coupled with the further fact that Colorado-Ute is unable to fill its valleys on its system, indicates that its resource management plan and associated flat energy rate are not working to the benefit of its ratepayers.

In order to improve the performance of the resource management plan, and to more fully substantiate a need for any future generation facilities, the Commission believes it will be beneficial for Colorado-Ute to investigate the implementation of a load research program. Such a program would result in enhancing the knowledge of both the Commission in rendering a decision with regard to rates, and Colorado-Ute in incorporating system load characteristics in its

planning efforts. A load research program should be able to provide at a minimum a general assessment of the magnitude and impact of the demands of the various customer classes in the distribution member systems. Such an investigation should include a thorough evaluation of the feasibility of load research data transferability among member systems, as well as among other utilities as recommended in the direct testimony of Staff witness Mitchell. A copy of the feasibility study is to be filed with this Commission six months from the effective date of this order.

Since the evidence in this record indicates that Colorado-Ute's total costs of generating a kilowatt hour are not unifrom over time, it follows that a flat or uniform energy rate is not cost tracking. To the contrary, a demand/energy rate provides separate and distinct recognition to the two major cost components of producing electricity: capital and fuel. The demand component recognizes the cost of plant in service necessary to meet load requirements and the demand charge is based on the member systems' share in using Colorado-Ute's plants. Staff witness Loehr testified that as much as two-thirds of Colorado-Ute's costs are capital related and that a demand charge should be part of Colorado-Ute's rate design. If the member systems are to receive accurate price signals, demand and energy costs must be distinguished.

Staff witness Wendling, as a result of his cost-of-service study of the fourteen Colorado-Ute members and one non-member, recommended and sponsored seasonally differentiated demand/energy rates. Mr. Wendling used an average and excess demand (AED) methodology for allocating production plant investment with coincident peak on the excess portion of the allocator. As mentioned previously, the cost of service study sponsored by Staff was the only cost of service study

offered and admitted into evidence in this case. The rate proposed by Staff as a result of the cost of service study is a demand/energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis. The methodology employed by Staff followed cost of service principles that have been articulated and endorsed by this Commission in the past. The results of functionalizing customer demand and energy costs were depicted on Exhibit 60 which was admitted into the record.

Intervenor Atlantic Richfield Company (ARCO) and Exxon Company, U.S.A. (Exxon), while in general agreement with the Staff in this case, objected to the allocation of some $24,084,126 of the average demand revenue to the annualized energy charge. Intervenors ARCO and Exxon argue that these charges are appropriately assigned to the demand component of the rate and to include them in the energy charge will have the effect of distorting the price signal to the member systems by artificially depressing the true cost reflective of the investment in plant.

Staff witness Wendling testified that for generation costs only there should be a recognition of the utilities' investment in thermal coal-fired generation plants. Investment in such plants minimizes the cost of fuel relative to investment in peaking plants with its attendant low capacity or capital costs and high fuel costs for fuels such as oil or gas.

Mr. Wendling testified that Staff was surprised at the degree to which Colorado-Ute's generators were cycled to follow load. This dispatch pattern indicates that although these units are coal-fired, they are being used only partially for base load generation. Substantial portions of these units are being

used for peaking purposes. In effect, units with high capital costs and low running costs have been substituted for units with low capital costs and high running costs in meeting Colorado-Ute's load. Although such capital substitution may accord with the national energy policy, it nevertheless creates an artificially high demand charge and an artificially low energy charge. Moreover, no recognition is given to the off-peak use of base load capacity. One way to address these deficiencies is by the use of a time-of-use rate which would recognize the use of capacity at the times it occurs.

The disadvantage of a time-of-use rate, of course, is the increased complexity of metering and billing, and the need to perform cost allocation studies for the distribution cooperatives. As a surrogate for such a rate, Mr. Wendling proposed a modification of the demand-energy rate. In this modified rate, the dollars of generation costs associated with the average portion of the AED allocation were spread into the energy charge. Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base load generation that would have been spread to all hours by a time-of-use rate. Mr. Wendling further testified that the energy charge of 2.7 cents per kilowatt hour produced by this method closely approximated the off-peak energy charge of 2.89 cents per kilowatt hour produced by a time-of-use analysis. Moreover, the off-peak energy charge produced by the time-of-use analysis showed only a de minimis variation from summer to winter so that a uniform energy charge tracks costs very well.

With the revenue requirement associated with base load generation transferred to the energy charge, only the excess portion of the AED allocation remained to be collected in the demand charge. For Colorado-Ute's particular load shape and

seasonality, the excess portion of the AED is a proxy for the peaking portion of the generating facilities. This peaking capacity was allocated on the basis of coincident peak demand recognizing that the members exhibit a high coincidence with the Colorado-Ute system peak. Placing only the excess portion of the AED allocation in the demand charge provides an automatic incentive to Colorado-Ute to improve its system load factor since the higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate. The use of the demand/energy rate, with that portion of the excess allocator reflecting demand charges associated with peak generation assigned to the demand charge, as sponsored by Staff in this proceeding, will provide Colorado-Ute with a strong incentive to raise its load factor. This should, if applied in conjunction with an effective resource management plan, produce essentially a flat rate, the very rate Colorado-Ute seeks to employ. This rate form has the additional advantage that, in the present application, it comports with the regulatory objective of rate stability.

The Commission finds, based on the evidence in the record, that the demand/energy rate (with attendant customer charge) proposed by Staff in this proceeding is the most cost tracking rate for the wholesale power charges of Colorado-Ute. The evidence indicates that:

1. Colorado-Ute's costs are not uniform over all levels of output;

2. the experimental flat energy rate provides a distorted price signal to member systems;

3. there has been a general deterioration of Colorado-Ute's load factor;

4. the resource management plan of Colorado-Ute has not met the objective of generating off-peak non-member sales for the purpose of filling in the valleys on Colorado-Ute's load curve;

5. the demand/energy rate more directly tracks costs than a flat rate;

6. the demand/energy rate provides an accurate price signal and assigns costs more directly to the cost causer; and

7. the assignment of a portion of generation costs from the average portion of the cost allocation methodology to the energy charge properly recognizes the benefits which accrue from a system constructed of low fuel cost generating units which are designed for base load operation.

CONCLUSIONS ON FINDINGS OF FACT

The Commission concludes that: (1) the Motion to Dismiss filed by Intermountain should be denied; (2) Colorado-Ute shall file demand energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy on a uniform kwh basis as hereinafter ordered.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. The "Motion of Intermountain Rural Electric Association to Dismiss for Lack of Jurisdiction" filed on August 27, 1982, by Intermountain Rural Electric Association be, and hereby is, denied.

2. Colorado-Ute Electric Association, Inc., within thirty (30) days of the effective date of the decision and order herein shall file rates and tariffs reflecting the rates set forth in Appendix B attached hereto and incorporated herein.

3. Colorado-Ute Electric Association, Inc., shall submit to this Commission a feasibility study of a load research program, as discussed on pages 19 and 20 of the decision herein. Such feasibility study is to be submitted within six (6) months of the effective date of the decision and order herein.

4. The twenty (20) day time period provided for pursuant to CRS 1973, 40-6-114(1) within which to file an application for rehearing, reargument, or reconsideration shall commence to run on the first day following the mailing or serving by the Commission of the decision herein.

This Order shall be effective twenty-one (21) days from the day and date hereof.

DONE IN OPEN MEETING the 26th day of July, 1983.

(S E A L) THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

Commissioners

COMMISSIONER ANDRA SCHMIDT
NOT PARTICIPATING

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

Decision No. C83-1176
APPENDIX A

EXHIBITS OF PUBLIC WITNESSES

EXHIBIT NO.	
1	Homeowners Guide to Use of Demand Controllers
2	Comments of Dr. Moe - Dencor, Inc.
3	Testimony of Teresa Erickson
4	Testimony of Joe Pepi

EXHIBITS OF THE PARTIES

Exhibit	Description	Sponsored by
A.	Direct testimony of Girts Krumins	Colorado-Ute
B.	Direct testimony of Gene M. Harris	Colorado-Ute
C.	Direct testimony of Robert H. Walker	Colorado-Ute
D.	Direct testimony of Steven M. Foss	Colorado-Ute
E.	Prepared testimony of C. Ward Armstrong	Delta-Montrose

Exhibit	Description	Sponsored by
F.	Prepared testimony of David Potter	Delta-Montrose
G.	Prepared testimony of Richard W. Bussing	Delta-Montrose
H.	Prepared testimony of Joe Holeyfield	White River
I.	Prepared testimony of A. J. Letey	Grand Valley
J.	Prepared testimony of Norman Knudsen	Sangre De Cristo
K.	Prepared testimony of Ed Grange	Holy Cross
L.	Prepared testimony of James A. Golden	Yampa Valley
M.	Prepared testimony of Stanley R. Lewandowski, Jr.	Intermountain
N.	Prepared testimony of William W. Wood	San Isabel
O.	Prepared testimony of Norman Bailey	Southeast Colorado Power

Exhibit	Description	Sponsored by
P.	Prepared testimony of John Sheppard	San Luis Valley Rural Electric
Q.	Prepared testimony of Garrett Y. Fleming	Staff
R.	Prepared testimony of William Loehr	Staff
S.	Prepared testimony of Warren L. Wendling	Staff
T.	Prepared testimony of Bruce S. Mitchell	Staff
U.	Rebuttal Testimony of Girts Krumins	Colorado-Ute
V.	Supplemental Rebuttal Testimony of Girts Krumins	Colorado-Ute
W.	Rebuttal Testimony of Gene M. Harris	Colorado-Ute
X.	Rebuttal Testimony of Gary E. Pierson	Colorado-Ute
Y.	Rebuttal Testimony of Raymond E. Keith	Colorado-Ute

Exhibit	Description	Sponsored by
1.	GK-1 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
2.	GK-2 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
3.	GK-3 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
4.	GK-4 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
5.	GK-5 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
6.	GK-6 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
7.	GK-7 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
8.	GK-8 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
9.	GK-9 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
10.	GK-10 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute

Exhibit	Description	Sponsored by
11.	GK-11 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
12.	GK-12 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
13.	GK-13 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
14.	GK-14 Accompanying Direct Testimony of Girts Krumins	Colorado-Ute
15.	WSCC Power Supply Design Criteria	Staff
16.	REA Bulletin 112-5	Staff
17.	GH-1 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
18.	GH-2 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
19.	GH-3 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
20.	GH-4 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
21.	GH-5 Accompanying Direct Testimony of Gene Harris	Colorado-Ute

Exhibit	Description	Sponsored by
22.	GH-6 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
23.	GH-7 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
24.	GH-8 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
25.	GH-9 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
26.	GH-10 Accompanying Direct Testimony of Gene Harris	Colorado-Ute
27.	GH-11 Statement of Income for 1st 8 months of 1982	Colorado-Ute
28.	Calculation of Annualized Interest	Staff
29.	RJW-1 Accompanying Direct Testimony of Walker	Colorado-Ute
30.	SMF-1 Accompanying Direct Testimony of Foss	Colorado-Ute
31.	SMF-2 Accompanying Direct Testimony of Foss	Colorado-Ute
32.	SMF-3 Accompanying Direct Testimony of Foss	Colorado-Ute

Exhibit	Description	Sponsored by
33.	DLP-1 Accompanying Testimony of Potter	Delta-Montrose
34.	DLP-2 Accompanying Testimony of Potter	Delta-Montrose
35.	DLP-3 Accompanying Testimony of Potter	Delta-Montrose
36.	DLP-4 Accompanying Testimony of Potter	Delta-Montrose
37.	DLP-5 Accompanying Testimony of Potter	Delta-Montrose
38.	DLP-6 Accompanying Testimony of Potter	Delta-Montrose
39.	3 Page Exhibit - Operating Data Holy Cross	Exxon
40.	Revenue from Ski Area Operators as a Percentage of total revenues for the year 1981	Holy Cross
41.	JAG-1 Accompanying Testimony of J. A. Golden	Yampa Valley
42.	JAG-2 Accompanying Testimony of J. A. Golden	Yampa Valley

Exhibit	Description	Sponsored by
43.	JAG-3 Accompanying Testimony of J. A. Golden	Yampa Valley
44.	Simplified WASP Flow Chart	Staff
45.	GYF Schedules 1 - 6 Accompanying Testimony of Garrett Y. Fleming (21 Pages)	Staff
46.	Copy of the original agreement for computer program services between DORA (cover page memo dated July 26, 1982) and Colorado School of Mines	Staff
47.	Subcontract between ENTEK and the Commission	Staff
48.	WL-1 Forecasts of Electrical Energy and Peak Power Demand for Colorado-Ute (144 Pages)	Staff
49.	WL-2 Documents Cited in CUEA Case (2 Pages)	Staff
50.	WL-3 Graph Corresponding Load Factor (1 Page)	Staff
51.	WL-4 Marginal Cost of Capacity per KWH (1 page graph)	Staff

Exhibit	Description	Sponsored by
52.	WL-5 Marginal Cost of Capacity: 3 Different Coincidence Factors (1 Page)	Staff
53.	WL-6 Marginal Cost of Capacity: 2 Different Peak Demands (1 Page)	Staff
54.	WL-7 Two Different Peak Demands and High Coincidence (1 page graph)	Staff
55.	WLW-1 Letter dated May 14, 1980 from Colorado-Ute to So. Calif. Edison Co. (6 Pages)	Staff
56.	WLW-2 Table of Sales at Time of Ute System Peak, Demand in KW (1 Page)	Staff
57.	WLW-3 Staff: Interchange Adjustment to Colorado-Ute (1 Page)	Staff
58.	WLW-4 CUEA Schedule 4A - Allocation of rate of return under proposed rates (3 pp w/addendum) Schedules (44 Pages)	Staff
59.	WLW-5 Electric Cost of Service Narrative (5 Pages)	Staff
60.	WLW-6 Staff Computation of Proposed Rate Tariffs of Colorado-Ute (8 Pages)	Staff

Exhibit	Description	Sponsored by
61.	WLW-7 WASP-82 Computer Program Description (4 Pages)	Staff
62.	WLW-8 Letter of May 4, 1982 from Colorado-Ute to Dr. Parkins (4 Pages)	Staff
63.	WLW-9 Report on Colorado-Ute (5 Pages)	Staff
64.	Rates Proposed by Staff and Rates proposed by Colorado-Ute.	Colorado-Ute
65.	FERC approved wholesale Rate Schedules of Public Service to various customers (19 Pages)	Colorado-Ute
66.	Simplified System Description CUEA	Exxon
67.	BSM-1 Review of Power Plant Performance Data C-U Hayden #1	Staff
68.	BSM-2 Review of Hourly Generation Patterns on Days of Maximum Requirements During Test Year	Staff
69.	BSM-3 Total Net Value of Distribution System Additions by Plant Account 1972-1981 CUEA	Staff
70.	BSM-4 Load Curves	Staff

Exhibit	Description	Sponsored by
71.	BSM-5 Cost of Compliance with Governmental Regulation	Staff
72.	SEC. 290.404 Title 18--Conservation of Power, Water Resources from Chapter I Federal Energy Regulatory Commission (pp 580-582)	Empire Electric
73.	Article "Service Area and Jurisdictional Variations in Factors Influencing Residential Electricity Demand" from Public Utilities Fortnightly (August 5, 1982, page 33)	Empire Electric
74.	REA Bulletin 45-2, Demand Tables - June, 1963 w/transmittal letter dated October 24, 1978 from REA to All Electric Borrowers	Empire Electric
75.	Wendling Diagram - Screening Costs	Staff
76.	GK-15 Monthly Load Factor, Acc. Rebuttal	Colorado-Ute
77.	GK-16 Day of Maximum Demand - Demand Curve, Acc. Rebuttal of Krumins	Colorado-Ute
78.	GK-17 Member Peak Diversity, Acc. Rebuttal	Colorado-Ute

Exhibit	Description	Sponsored by
79.	Comparison of Residential Heating Customers on Demand and Non-Demand Rates (Study and observations by M.E. Giddings for J. H. Ranniger) (27 Pages)	Colorado-Ute
80.	Bary Curve - as discussed by Colorado-Ute Witness Krumins in his rebuttal testimony (graph)	Exxon
81.	GEP-1 Accompanying Rebuttal of G. Pierson (3 Pages)	Colorado-Ute
82.	GEP-2 Accompanying Rebuttal of G. Pierson (5 Pages)	Colorado-Ute
83.	GEP-3 Accompanying Rebuttal of G. Pierson	Colorado-Ute
84.	Staff Cost-of-Service Study Based on Demand-Energy Rate	Exxon
85.	REK-1 Accompany [sic] Rebuttal Testimony of R. Keith	Colorado-Ute
86.	REK-2 Accompany [sic] Rebuttal Testimony of R. Keith	Colorado-Ute
87.	Rates proposed by Staff and Rates proposed by Colorado-Ute under investigation this case.	Staff

Exhibit	Description	Sponsored by
88.	Staff Exhibit (WLW-16) 18 Pages - Proposed rates Staff Computation	Staff
89.	Forecast with Demand & Energy Rate and Load Controller (graph)	Staff
90.	Daily Load Shape for Day of Annual System Peak (graph) 1971, 1981, 1991	Staff
91.	Daily Load Shape for Day of Annual System Peak (graph) 1981	Staff
92.	CUEA - Report for Utility Wed. November 8, 1982 (6 Pages)	Staff
93.	CUEA Incremental Cost and Benefit Analysis, Demand Energy Rates for New Electric Space Heating 1983 - 2001	Staff
94.	CUEA Review of Occurence [sic] of Member System Monthly Demands (4 Pages)	Staff
95.	Load Plot of CUEA for example Month of November 1980 (Hand-drawn diagram - Mitchell)	Staff

Exhibit	Description	Sponsored by
96.	14 Member Peak Demand, Member Demand at Time of 14 Peak Ratio Thereof	Colorado-Ute

All of the above listed exhibits were admitted into evidence.

LIST OF INTERVENORS

	Date Petition Filed	Granted
Upper Arkansas Area Agency on Aging	1-8-82	2-17-82
San Luis Valley Rural Electric Cooperative	1-29-82	2-2-82
White River Electric Association	2-4-82	2-17-82
Yampa Valley Electric Association	2-8-82	2-17-82
Intermountain Rural Electric Association	2-8-82	2-17-82
San Isabel Electric Association, Inc.	2-9-82	2-17-82
Western Slope Energy Research Center	2-16-82	4-15-82
Grand Valley Rural Power Lines, Inc.	2-19-82	2-23-82
Sangre De Cristo Electric Association, Inc.	2-23-82	2-23-82
Western Colorado Congress	2-23-82	4-15-82
Delta-Montrose Electric Association, Inc.	2-25-82	3-12-82

	Date Petition Filed	Granted
City of Delta, Colorado	2-26-82	3-26-82
Empire Electric Association, Inc.	2-26-82	3-26-82
Union Carbide Corporation	3-1-82	3-26-82
Shell Oil Company	6-10-82	7-9-82
San Miguel Power Association, Inc.	7-30-82	8-17-82
Exxon Co., USA	8-27-82	9-14-82
Holy Cross Electric Association	2-25-82	3-12-82
Southeastern [sic] Colorado Power Association	Orally allowed to intervene at hearing	
Atlantic Richfield	Orally allowed to intervene at hearing	

Decision No. C83-1176
APPENDIX B

Rates Proposed By Staff

Rate Schedule A	
Customer Charge	$593.00 per month
Summer Demand Charge (May 1 through September 30)	$4.27 per kw
Winter Demand Charge (October 1 through April 30)	$9.74 per kw
Energy Charge	$0.0279349 per kwh[2]
Energy Charge	$0.0279849 per kwh[1]
Rate Schedule B	
Customer Charge	$593.00 per month
Summer Demand Charge (May 1 through September 30)	$5.17 per kw
Winter Demand Charge (October 1 through April 30)	$7.01 per kw
Energy Charge	$0.0265230 per kwh[2]
Energy Charge	$0.0265730 per kwh[1]

Notes:

[1] Rate including Tariff Rider No. 1 if Colorado-Ute Electric Association, Inc. does the billing to its distribution electric cooperatives.

[2] Net effective rate.

(Decision No. C83-1392)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION, INC.	))))))	CASE NO. 6076 ORDER OF THE COMMISSION

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September 7, 1983

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STATEMENT AND FINDINGS

BY THE COMMISSION:

On July 26, 1983, the Commission entered Decision No. C83-1176 establishing a demand-energy rate structure for Colorado-Ute Electric Association, Inc. (Colorado-Ute) in the above-captioned case. The effective date for Decision No. C83-1176 was set for twenty-one days from July 26, 1983, or August 16, 1983. Ordering paragraph 2 of Decision No. C83-1176 provided that Colorado-Ute is to file within thirty days of the effective date of the decision, that is, on or before Septem-

ber 15, 1983, the rates and tariffs reflecting the rates as set forth in Appendix B attached to Decision No. C83-1176.

Various petitions and applications for rehearing, reargument and reconsideration have been filed by Colorado-Ute and other intervenor distribution cooperative members of Colorado-Ute, and industrial customers. These various applications and petitions are as follows:

1. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by San Luis Valley Rural Electric Cooperative, Inc.

2. Entry of Appearance and Application for Rehearing, Reconsideration or Reargument of Decision No. C83-1176 filed by San Miguel Power Association, Inc.

3. Application for Rehearing, Reconsideration and Reargument of Decision No. C83-1176 filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., and Yampa Valley Electric Association, Inc.

4. Application of Grand Valley Rural Power Lines, Inc., for Rehearing or Reconsideration of the Order of the Commission Dated 7-26-83 (Decision No. C83-1176) Establishing a Rate Structure for Colorado-Ute.

5. Motion for Reconsideration by Southeast Colorado Power Association.

6. Petition for Rehearing, Reargument, and for Reconsideration of Decision No. C83-1176 filed by Intermountain Rural Electric Association, Inc.

7. Application for Rehearing, Reconsideration or Reargument of Decision No. C83-1176 filed by Atlantic Richfield Company and Exxon Corporation.

8. Application for Rehearing, Reargument or Reconsideration of Decision No. C83-1176 filed by Colorado-Ute Electric Association, Inc.

9. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by San Isabel Electric Association, Inc.

10. Petition for Rehearing, Reargument and Reconsideration of Decision No. C83-1176 filed by The Gunnison County Electric Association, Inc.

11. Application for Rehearing, Reargument or Reconsideration of Decision No. C83-1176 filed by Sangre de Cristo Electric Association, Inc.

12. Application for Rehearing, Reconsideration and Reargument of Decision No. C83-1176 filed by White River Electric Association, Inc.

13. Application for Rehearing, Reargument or Reconsideration filed on Behalf of Empire Electric Association, Inc.

14. Application for Rehearing, Reargument and Reconsideration filed by La Plata Electric Association, Inc.

The Commission states and finds that the various petitions and applications for rehearing, reargument or reconsideration, as set forth above, do not set forth sufficient factual and legal grounds for the granting thereof, and accordingly, except as hereinafter noted, the same shall be denied. However, we do believe that it would be appropriate to comment on the following issues that have been raised. First, it has been argued by Colorado-Ute that the decision setting its filed rates for hearing did not give Colorado-Ute notice that the Commission intended to review Colorado-Ute's rate design. We believe it is entirely too late to raise the issue of inadequate notice at this late juncture in the proceeding. If, in fact, Colorado-Ute had been "surprised" by the fact that the Commission intended to hear testimony and receive exhibits from the Staff of the Commission on the issue of rate design, Colorado-Ute was perfectly free to file an appropriate motion, at the beginning of this proceeding, to limit the scope of the hearing herein. Colorado-Ute did not do this. Colorado-Ute cannot fairly go through an entire proceeding, in which the most hotly contested issue was rate design, obtain a decision which is not to its liking, and then turn around and claim that it had no notice of the fact that rate design was to be a part of the hearing herein. In any event, the phraseology of the decision instituting Case No. 6076 wherein the Commission found that "it should set the above-cited schedules . . . for hearing because of the important impact on its electric distribution members" is sufficiently broad as to fairly inform Colorado-Ute that all matters relating to its filed rate schedules would be subject to hearing. The fact that the Commission further found, in its decision setting

Case No. 6076 for hearing, that Colorado-Ute's schedules may be improper because of changing financial conditions, cannot by any stretch of the imagination be taken as limiting the scope of the hearing to "changing financial conditions" only. Accordingly, Colorado-Ute's discomforture over what it believes to be a lack of notice is not well taken.

Second, Colorado-Ute claims that inasmuch as Decision No. C83-1176 did not use the "magic" words in finding that Colorado-Ute's schedules were unjust and unreasonable, and that the rates that were ordered to be instituted by the Commission, in lieu thereof, were "just and reasonable", that the Commission has exceeded its powers. The contention, of course, is facetious inasmuch as the Colorado Supreme Court in the case of Aspen Airways, Inc. v. Public Utilities Commission, 169 Colo. 56, 453 P.2d 789 (1969) has stated that findings of the Commission need not take any particular form. It is also true that certain findings of the Commission may be implied. Caldwell v. Public Utilities Commission, ___Colo.___, 613 P.2d 328, 333 (1980); Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 472 P.2d 960 (1970); City and County of Denver v. People, ex rel. Public Utilities Commission, 129 Colo. 41, 46, 226 P.2d 1105 (1954).

Notwithstanding Colorado-Ute's contention, unsupported by any case law, that this Commission cannot "cure" Decision No. C83-1176 by amending it to include "cursory" findings that Colorado-Ute's rate structure was "unjust, unreasonable, discriminatory, preferential or in violation of law," since, in Colorado-Ute's view, the record does not contain any competent evidence that a unit pricing rate, which charges everyone the same cents per kilowatt hour, is unjust, unreasonable, discriminatory, preferential, or in violation of law, we shall none the

less explicitly state that Colorado-Ute's rate structure is in fact unjust, unreasonable, discriminatory, and preferential, in that its unit pricing rate is not cost tracking for the reasons set forth in Decision No. C83-1176. By the same token, we explicitly find that the rate schedule proposed by the Staff of the Commission, as a result of its cost of service study, being a demand-energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis, is more nearly cost tracking than that proposed by Colorado-Ute, and accordingly, the Staff rate is, in fact, just and reasonable and should be adopted.

Third, Colorado-Ute argues a due process violation on the basis of the Staff's refusal to provide Colorado-Ute with a copy of the WASP-82 analysis which, according to Colorado-Ute, foreclosed it "any opportunity to effectively cross-examine Staff witness Wendling." In fact, as Colorado-Ute knows, the record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof. The Commission has reviewed the transcripts of this proceeding, and especially those portions relating to the dialogue between the Staff, Colorado-Ute, and the Commission relating to the WASP-82 program. The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and to do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or

by telephone, but I don't think I'll need any additional paper prepared."

Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged notwithstanding its counsel's pro forma objection on the record. (See October 26, 1982 transcript, p. 61).

Intervenors Atlantic Richfield Company (ARCO) and Exxon Company, U.S.A., a division of Exxon Corporation (Exxon), in their application for rehearing, reconsideration or reargument, inter alia, requested that the Commission clarify its intention with respect to monthly billing demand integration. ARCO and Exxon request that the Commission order monthly billing demand to be integrated over all delivery points for each Colorado-Ute member, rather than billing based upon the maximum demands of each delivery point meter for the particular member. ARCO and Exxon also request that this Commission specifically order no demand ratchet provisions are to be applied to the proposed Colorado-Ute member customer energy demand rates. We find that these two requests by ARCO and Exxon are reasonable and should be granted. Accordingly, we shall, in the order hereafter, add a third footnote to Appendix B to Decision No. C83-1176, which will provide for the needed clarification.

The Commission states and finds that other legal or factual arguments raised by various parties herein in their respective petitions or applications for rehearing, reargument or reconsideration, do not set forth sufficient factual or legal grounds for the granting thereof and that the same should be denied.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. Except as hereinafter indicated, the various petitions or applications for rehearing, reargument or reconsideration filed by various parties herein, as set forth in the decision above, be, and hereby are, denied.

2. Appendix B to Decision No. C83-1176 is amended to add a third footnote thereto which shall read as follows:

> [3] For purposes of monthly billing demand, said demand is to be integrated over all delivery points for each Colorado-Ute Electric Association member and shall not be based upon the maximum demand of each delivery point meter for the particular Colorado-Ute Electric Association member. No demand ratchet provisions are to be applied by Colorado-Ute Electric Association with respect to the customer energy demand rates herein.

3. The stay of ordering paragraph 2, as contained in Decision No. C83-1176, said stay having been ordered by Commission Decision No. C83-1391, dated September 7, 1983, be, and the same hereby is, dissolved as of October 7, 1983.

4. Decision No. C83-1176 is modified pursuant to this decision, and as so modified, subject to the provisions of CRS 1973, 40-6-114(1).

5. The twenty (20) day time period provided for pursuant to CRS 1973, 40-6-114(1) within which to file an application for rehearing, reargument, or reconsideration shall commence to run on the first day following the mailing or serving by the Commission of the decision herein.

This Order shall be effective twenty-one (21) days from the day and date hereof.

DONE IN OPEN MEETING the 7th day of September, 1983.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

ANDRA SCHMIDT

Commissioners

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

(Decision No. C83-1561)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION, INC.	) CASE NO. 6076	) ORDER OF THE COMMISSION

October 4, 1983

STATEMENT AND FINDINGS

BY THE COMMISSION:

Applications for rehearing, reconsideration and reargument of Commission Decision No. C83-1392 were filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., Yampa Valley Electric Association, Inc., White River Electric Association, Inc., Colorado-Ute Electric Association, Inc., Atlantic Richfield Company, Exxon Company, U.S.A., Southeast Colorado Power Association, Empire Electric Association, Inc., La Plata Electric Association, Inc., Intermountain

Rural Electric Association, Sangre de Cristo Electric Association, Inc., Grand Valley Rural Power Lines, Inc., San Isabel Electric Association, Inc., San Luis Valley Rural Electric Cooperative, Inc., Gunnison County Electric Association, Inc., and a late-filed application for rehearing by San Miguel Power Association, Inc. In addition, Colorado-Ute Electric Association, Inc. filed a motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392.

After review of the applications for rehearing, reargument and reconsideration filed by the above-named parties, the Commission states and finds that no new grounds have been shown to persuade the Commission to grant the relief requested in these applications. Accordingly, these applications will be denied.

In regard to the motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 filed by Colorado-Ute Electric Association, Inc., the Commission finds that CRS 1973, 40-6-114, which provides authority to the Commission to stay a Commission decision upon the filing of application for rehearing, reargument or reconsideration of a decision, does not apply to the instant proceeding because the Commission has considered and reviewed all pending applications for rehearing, reargument or reconsideration of Commission Decision No. C83-1392 and has determined to deny such.

The Commission also states and finds that insufficient grounds have been set forth by Colorado-Ute to grant the motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392. The

Commission will further order that response time to the motion to stay the filing date for rates and tariffs should be waived in that Colorado-Ute is now required to file such rates and tariffs by October 7, 1983 and response time to such motion will expire on October 6, 1983. Accordingly, the motion to stay the filing date for rates and tariffs should be denied, and responses to such motion will be waived by the order to follow.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. The applications for rehearing, reconsideration and reargument filed by Delta-Montrose Electric Association, Holy Cross Electric Association, Inc., Yampa Valley Electric Association, Inc., White River Electric Association, Inc., Colorado-Ute Electric Association, Inc., Atlantic Richfield Company, Exxon Company, U.S.A., Southeast Colorado Power Association, Empire Electric Association, Inc., La Plata Electric Association, Inc., Intermountain Rural Electric Association, Sangre de Cristo Electric Association, Inc., Grand Valley Rural Power Lines, Inc., San Isabel Electric Association, Inc., San Luis Valley Rural Electric Cooperative, Inc., Gunnison County Electric Association, Inc., and late-filed application by San Miguel Power Association, Inc., are hereby denied.

2. The motion to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 filed by Colorado-Ute Electric Association, Inc., is hereby denied.

3. Response time to the motion filed by Colorado-Ute Electric Association, Inc. to stay the filing date for rates and tariffs under Commission Decision Nos. C83-1176 and C83-1392 is waived.

This Order shall be effective forthwith.

DONE IN OPEN MEETING the 4th day of October, 1983.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

ANDRA SCHMIDT

Commissioners

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.

Harry A. Galligan, Jr.
Executive Secretary

SUPREME COURT, STATE OF COLORADO
Case No. 86 SA 244 and 86 SA 246
APPEALS FROM THE DISTRICT COURT, MONTROSE COUNTY, NOS. 83CV218 & 84CV007

ORDER OF COURT

COLORADO-UTE ELECTRIC ASSOCIATION, et al,
Petitioners-Appellees,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,
Respondent-Appellant,

and

SHELL OIL COMPANY; et al,
Respondents-Appellees, 86 SA 244

and

ATLANTIC RICHFIELD COMPANY AND EXXON CORPORATION,
Petitioners-Appellees,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Respondents-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
Respondent-Appellee.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; et al,
Appellees,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Appellants,

86 SA 246

and

ATLANTIC RICHFIELD COMPANY AND EXXON CORPORATION,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; et al,
Appellees.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT. EN BANC. AUGUST 15, 1988.
Justices Erickson, Lohr and Vollack would grant the Petition for Rehearing of the Public Utilities Commission.

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC

RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Notice is hereby given that Colorado-Ute Electric Association, Inc. (Colorado-Ute) and 13 of the 14 rural electric distribution cooperatives who are its members,[1] (hereinafter called "the Thirteen Members") the appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Colorado entered August 15, 1988 denying Colorado-Ute's and the Thirteen Members' petitions for rehearing of the Supreme Court of the State of Colorado's July 11, 1988 opinion which reversed in part and affirmed in part the decision of the Colorado district court.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2), prior to its amendment by Section 7 of the Act of June 27,

---

[1] The 13 appellants are Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc.

1988, 102 Stat. 664, P.L. 100-352.

Respectfully submitted,

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Dated: November 1, 1988

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of November, 1988, I mailed a true and correct copy of the foregoing Notice Of Appeal To The Supreme Court Of The United States by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

COLORADO-UTE'S PETITION FOR REHEARING

Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

Appellee, Colorado-Ute Electric Association, Inc. (Colorado-Ute), pursuant to C.A.R. 40 submits the following Petition for Rehearing and as grounds therefor states as follows.

INTRODUCTION

Colorado-Ute is filing this Petition seeking Rehearing of the Court's Opinion affirming in part and reversing in part the order of the district court which set aside the decision of the Public Utilities Commission (PUC). Colorado-Ute believes that this Court's decision was erroneous in that it failed to properly consider a number of issues essential to a just result. In the remainder of this Petition, Colorado-Ute will discuss each issue individually in order to demonstrate that the grant of this Petition is warranted under the circumstances.[1] Given the required brevity of this Petition, Colorado-Ute requests the opportunity to brief each of these arguments in greater detail for the Court's reference.

LEGAL ARGUMENT

I. THE PUC'S ADMISSION OF EVIDENCE CONCERNING AND DERIVED FROM THE WASP-82 COMPUTER PROGRAM WAS ERRONEOUS AND CONSTITUTED A DEPRIVATION OF DUE PROCESS.

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[1] Due to page restrictions, this Petition is limited to discussion of certain key constitutional and other issues. Other important issues are discussed in a Supplemental Petition which has been conditionally filed herewith.

During the course of the PUC hearings, the PUC allowed the results of certain computer analyses referred to by the PUC Staff (Staff) as the WASP-82 analyses to be admitted into evidence over Colorado-Ute's objection. Colorado-Ute objected to the admission of such evidence as a result of the Staff's refusal to provide Colorado-Ute with access to the WASP-82 program and supporting documentation. Colorado-Ute's motion for such access was denied by the PUC. This issue is significant in that the decision of the PUC and by extension of this Court rests almost wholly on the conclusions derived from the use of the WASP-82 program.[2]

Colorado-Ute acknowledges that this issue, although addressed in the district court, was not specifically raised before this Court. This is not surprising. Although the district court did not rule in Colorado-Ute's favor on the WASP-82 issue, Colorado-Ute nevertheless prevailed on the main issue (flat rate/demand rate) and was the Appellee before this Court.

Under the circumstances, a cross-appeal of the district court's WASP-82 decision was unnecessary. As the Appellee, Colorado-Ute's primary concern was to respond to the issues raised by the Appellants. In addition, in a subsequent case,[3] the PUC excluded evidence derived from a later version of WASP-82 on the basis that the parties' due process would be violated by the Staff's denial of the program documentation.

---

[2] For example, the cost-of-service study upon which this Court placed such reliance was the result of the WASP-82 program.

[3] In the Matter of the General Investigation of Costing Methodologies and Rate Structures of Electric Utilities, Case No. 6130.

Consequently, Colorado-Ute had reason to believe that the WASP-82 issue was resolved.[4] Given this Court's ultimate decision, however, it is imperative that this issue now be given due consideration.

Colorado-Ute's arguments in support of the inadmissibility of the WASP-82 program were thoroughly presented in the district court[5] and in Colorado-Ute's Applications for Rehearing, Reargument or Reconsideration. Without access to the computer program itself and supporting documentation, Colorado-Ute was unable to effectively cross-examine the testimony of the Staff.

Because of the property rights at stake, the Staff's refusal to provide the information is more than a mere evidentiary question. The failure of the PUC to afford Colorado-Ute the right to review the evidence used against it to justify the imposition of restrictions on its conduct constitutes a deprivation of due process. This deprivation of due process raises constitutional issues requiring full consideration by this Court on rehearing. Moreover, the failure of the Staff to provide the requested information was in violation of C.R.S. 24-72-204, the Colorado Open Records Law.

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[4] The PUC has now specifically included "computer records" within its definition of "public records" which the PUC must make available. See, PUC Rules of Practice and Procedure, Rule 5(b)(11).

[5] See Opening Brief of Colorado-Ute Electric Association, Inc., (Rec. Vol. II, pp. 356-364).

II. THE PUC SHOULD REHEAR THE CASE IN ORDER TO IMMEDIATELY DECIDE THE REFUND ISSUE.

In its Opinion, the Court noted that certain parties have requested an Order directing Colorado-Ute to refund amounts allegedly overpaid. The Court has not decided this question, although it is submitted by Colorado-Ute that it is an issue capable of determination as a matter of law. Since the refund issue is certain to come up again and may be the subject of further appeals, it is Colorado-Ute's belief that the Court will best serve justice by reaching that decision now rather than requiring the parties to wait as much as another seven years. In addition, since the refund issue was a factor in this Court's decision regarding mootness, if the Court were to rule that refunds were not due, the mootness issue would be ripe for reconsideration.[6]

With respect to the merits of the issue, it is Colorado-Ute's firm belief that refunds would be neither logical nor legal. The oil company parties are not customers of Colorado-Ute, rather they are retail customers of certain members of Colorado-Ute. Obviously, Colorado-Ute can only provide refunds to its direct customers who, incidentally, favor the flat rate and do not want refunds. Moreover, if such refunds were to be ordered, Colorado-Ute would have to obtain the necessary money from some other source since the rates ordered by the PUC would provide it with no excess revenues for this purpose. Ultimately the other customers would be

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[6] The mootness issue is further discussed in Colorado-Ute's Supplemental Petition conditionally filed with this Petition.

forced to bear the burden of such refunds in the form of increased rates. Such refunds would result in unlawful retroactive ratemaking and would constitute an unconstitutional confiscation of the property of Colorado-Ute and its members.

III. THE RURAL ELECTRIFICATION ADMINISTRATION'S APPROVAL OF THE FLAT RATE PREEMPTS THE PUC'S JURISDICTION TO ORDER COLORADO-UTE TO IMPLEMENT INCONSISTENT RATES.

The Rural Electrification Administration (REA), an agency of the federal government, approved the flat rate proposed by Colorado-Ute.[7] According to Colorado-Ute's mortgage with the United States, the approval of its rates is a prerequisite to their implementation.[8] It is well settled that a state commission may not impose regulations that conflict with those promulgated by the REA. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 103 S.Ct. 1905, 76 L. Ed. 2d 1 (1983). Consequently, the PUC had no right to impose rates on Colorado-Ute inconsistent with those approved by the REA.[9]

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[7] Tr. Vol IA, p. 70. A copy of this testimony is attached hereto for the Court's reference.

[8] Tr. Vol IA, p. 70.

[9] This issue is set forth in more detail in Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 32-33.

This issue was not raised in this Court. As stated in Section I above, Colorado-Ute, as the Appellee, had no reason to raise this issue until this Court's decision. In light of the decision, however, it is critical that this issue be decided by the Court.

IV. THERE ARE OTHER CONSTITUTIONAL QUESTIONS THAT HAVE NOT BEEN CONSIDERED BY THE COURT THAT REQUIRE REHEARING

As pointed out in Colorado-Ute's Application for Rehearing, Reargument or Reconsideration in Case 6076, the PUC decision interfered with Colorado-Ute's constitutional rights in a number of ways, none of which were considered by this Court. For example, the PUC failed to give Colorado-Ute proper notice that it intended to review Colorado-Ute's rate structure.[10] Additionally, the PUC's decision imposes an undue burden on interstate commerce.[11]

These issues were not raised below for the same reason that the WASP-82 issue was not; under the circumstances, it was simply unnecessary. Now, however, in order to comport with the principles of fundamental fairness, this Court must afford Colorado-Ute an opportunity to present this evidence and have it fully considered.

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[10] See Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 22-23.

[11] See Colorado-Ute's Application for Rehearing, Reargument or Reconsideration, dated August 15, 1983 at 33-34.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant Colorado-Ute's Petition for Rehearing for the purpose of reconsidering the issues raised herein and for such other purposes as the Court deems proper.

Dated: July 25, 1988

Respectfully submitted,

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

By: */s/ John R. McNeill*

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CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July, 1988, I served the foregoing Petition for Rehearing by depositing a true and correct copy hereof in the United States Mail, postage prepaid, addressed as follows:

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/s/ Dorothy L. Jordan

Colorado-Ute to the Rural Electrification Administration of the Department of Agriculture?

A Oh, the relationship is that we are what is called a borrower. The principal source of financing in the past came from insured loans of REA under a mortgage, which is a very tough mortgage and puts a lot of requirements on Colorado-Ute. And another source of funding comes through the guaranteed program of the REA. And we have loan contracts and mortgages that impose a number of requirements on us. So that is basically our relationship.

Q Does the REA have any requirement with regard to your rate structure?

A Yes, the REA requires that any time we want to change our rates we have to give notice under the mortgage, and they have the right to approve or disapprove that rate. Any rate, any wholesale rate we have to our members is subject to the approval of REA.

Q Is that a review procedure that you have undertaken in connection with the flat rate now in effect?

A The rate that is now in effect has been approved by REA, as was the one before that. All our rates have been always approved by the REA. That is a requirement.

MR. BANTA: I have no further questions.

CHAIRWOMAN MILLER: Thank you, Mr. Banta. Before I turn it over to Mr. Archibold, is there any other

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SUPREME COURT, STATE OF COLORADO
Case Nos. 86SA244 and 86SA246

COLORADO-UTE MEMBERS PETITION FOR REHEARING

SUPREME COURT, STATE OF COLORADO
Case No. 86SA244

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC

RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondent-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

SUPREME COURT, STATE OF COLORADO
Case No. 86SA246

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC; HOLY CROSS ELECTRIC

ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION,; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION;

WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

Opinion by Honorable Luis D. Rovira
EN BANC

The Thirteen Cooperative Associations, Members of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), which are listed below, respectfully request that the Supreme Court grant rehearing in these matters. The Members of Colorado-Ute are the only customers directly affected by the Court's decision and they are aggrieved by the results of that decision. In that the PUC found that Colorado-Ute's revenue increase was justified, Colorado-Ute will presumably receive the same revenues under any rate structure. The choice of rate structure will however, affect the customers, the Members of Colorado-Ute. It is their interests which are at issue. And they unanimously preferred the flat energy rate structure. The adverse effects of rate structure, either demand-energy or flat,

will be borne by the Members. And, as electric utilities, they have knowingly and willingly chosen the flat energy rate structure. In support of its petition, the Members note the following.

1. The Decision of the Public Utilities Commission and the Decision of this Court failed to note the impact of those Decisions on the 14 Members of Colorado-Ute, the only affected customers, in contravention of the purpose of the Public Utilities Law.

The purpose of the Public Utilities Law is to protect customers from unjust or unreasonable tolls or changes and preferential or discriminatory rates or charges. In these matters (both arising from the same decisions of the PUC), none of the affected customers, the 14 Colorado-Ute Members, complained about the flat energy rate structure utilized by Colorado-Ute. Rather, all of the customers who appeared testified about the adverse affects of a demand-energy structure and their

preference for a flat energy rate structure.[1] The Court, in failing to note this evidence, has affirmed a PUC order which was entered over the objection of all the affected customers and their power supplier. All of the affected customers, who testified, offered evidence as to the reasonableness and justness of the flat energy rate structure and the unreasonableness and injustice of the demand-energy rate structure.

The mere finding by the PUC that a demand-energy rate structure is the "most cost tracking" does not establish that the flat energy rate structure is so unwarranted as to be unjust, unreasonable, preferential or discriminatory. The affected customers, (who are themselves electric utilities) have said that the flat energy rate structure is the preferred rate structure. In Colorado, it is the utility which files rates. While the PUC may suspend such rates for utilities, which are not electric cooperatives, it may not substitute its judgment for that of the utility, unless the utility's rates are unjust, unreasonable, discriminatory or preferential.

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[1] See Testimony on behalf of the following Member Associations: Delta-Montrose (Tr. Oct 7, 1982, 10:00 a.m., p.216-221,); (Tr. Oct. 7, 1982, 10:00 a.m., p.280-282), (Tr. Oct. 7, 1982, 7:00 p.m., p.37-39); White River, (Tr. Oct. 7, 1982, 7:00 p.m., p.52-54,); Grand Valley (Tr. Oct. 7, 1982, 7:00 p.m., p.70-72,); Sangre de Cristo, (Tr. Oct. 7, 1982, 7:00 p.m., p.85-86,); Holy Cross (Tr. Oct. 8, 1982, p.35-44,); Yampa Valley (Tr. Oct. 1982, p.84-87, p.88-93,), Intermountain (Tr. Oct. 8, 1982, p.155-156,), San Isabel (Tr. Oct. 8, 1982, p.162-163,); and Southeast (Tr. Oct. 8, 1982, p.168-270).

Counsel respectfully notes that Sec. 40-6-111(4)(a) C.R.S., as interpreted by the Members - i.e. it sets forth a self-contained and exclusive method for review of rate filings of cooperative electric associations - was intended to avoid this result. Where the electric cooperative and all of its member-consumers are in agreement as to the rate, charge, rule or regulation, the PUC should not interfere.

The purpose of the Public Utilities Law is to balance the right of the utility to earn a reasonable return on its investment and the right of the customers to just, reasonable, non-preferential and non-discriminatory rates. Where the utility and its customers are in unanimous agreement, the PUC is not authorized to disturb that balance.

2. In affirming in part and remanding for further proceedings consistent with its order, this Court has denied due process to the Members in violation of the 14th Amendment of the U.S. Constitution and Act II, Section 25 of the Colorado Constitution.

The rate structure, under review by the PUC in this matter, affects only the revenues Colorado-Ute receives from its Members and, since the revenue increase sought by Colorado-Ute was approved by the PUC, (Decision P.7), it is only the portion of Colorado-Ute's revenue received from each Member that is in dispute. It is the property of each of the Members that will be affected by this Court's decision.

Hearings were held before the PUC in October and November 1982, almost six years ago. The evidence relied upon in determining that a demand-energy rate structure was appropriate for Colorado-Ute is no longer valid.

A demand-energy rate structure will also have an adverse impact on matters which have occurred since the close of hearings before the PUC. In a March 1983 filing with the PUC, Colorado-Ute added an interruptible rate schedule. Since that time approximately half of the Members have elected to receive service under that interruptible rate schedule. Hundreds of retail customers are now served under retail interruptible rate schedules. A demand-energy rate structure will interfere with the availability of interruptible rates. The economy has changed in the Members' service territory, as well as their growth in electric loads. There is a surplus of generation in the Rocky Mountain Region. Other areas, which may be adversely impacted by a demand-energy rate structure for Colorado-Ute's Members are: purchases from small power producers and cogenerators; and transmission agreements with others.

If the PUC enters an order on the appropriate wholesale rate structure that will be used to bill the members based on evidence that is more that six years old and no longer valid and without consideration of intervening developments, the Members will have been denied their rights to due process under the Colorado Constitution and the U.S. Constitution.

3. The Court, in discussing the possibility of refunds, has erred, in that the only payments, affected by the PUC Orders in this matter, are the payments made by the Members to Colorado-Ute and any refunds would be an unlawful confiscation of the Members' property under the 5th Amendment, U.S. Constitution.

The PUC, in Decision No. C83-1176, dated July 26, 1983, at p.14, noted that the tariffs at issue "relate only to the

wholesale power rates charged by it [Colorado-Ute] to its members and not the rates charged by the fourteen member distribution cooperatives to their respective end-use customers." The rates charged to ARCO, Exxon, and Shell Western E&P, Inc. were not at issue in the PUC proceeding and any refund ordered to those customers from the Members, who provide retail electric service to those customers, would be an unlawful confiscation of the Members' property under the U.S. Constitution.

Furthermore, if Colorado-Ute were ordered to make refunds to any of its Members, based on a rate structure that was not in effect for the period covered by the refunds, (even though the rates charged by Colorado-Ute were lawful at the time), the financial condition of Colorado-Ute would be adversely affected. Colorado-Ute is a non-profit corporation, as noted at p.5 of the Court's decision, and the only wholesale electric rates, over which the PUC has any jurisdiction, are the rates Colorado-Ute charges its Members. If Colorado-Ute makes refunds and is thus revenue deficient, all of the Members of Colorado-Ute will pay higher future rates to cover that deficiency. Any refunds ordered to be made by Colorado-Ute will result in an unlawful confiscation of the Members' property under the U.S. Constitution.

4. The PUC Decisions, as affirmed by this Court, impair the Members' Contracts with Colorado-Ute in violation of Contract Clause, U.S. Const., Act I, Section 10, cl 1, and Colo Const. Act. II, Section 11.

The PUC decision, in these matters, affect the rates Colorado-Ute charges its Member Associations for wholesale electric service and only those rates. Colorado-Ute provides

that service in accordance with the terms of all requirement contracts with the members, which contracts extend through December 31, 2025.[2] Neither Colorado-Ute, the Members, nor the Rural Electrification Administration objected to or complained about the flat energy rate structure established pursuant to the all-requirements contract. The PUC Decisions, as affirmed by this Court, impair the Members' contracts with Colorado-Ute in violation of the Contract Clause of the U.S. Constitution and the Colorado Constitution (See: Refining Co. v. Public Utilities Commission, (1920), 68 Colo. 137, 187 p. 1082).

Conclusion

Wherefore the members respectfully request that the Supreme Court grant rehearing in these matters.

Respectfully submitted,

Delta-Montrose Electric Association
Grand Valley Rural Power Lines, Inc.
Gunnison County Electric Association, Inc.
Holy Cross Electric Association, Inc.
Intermountain Rural Electric Association
La Plata Electric Association, Inc.

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[2] (See "Brief of Intermountain Rural Electric Association In Support of Motion to Dismiss for Lack of Jurisdiction", filed Aug. 27, 1982).

San Isabel Electric Association, Inc.
San Luis Valley Rural Electric Cooperative, Inc.
San Miguel Power Association, Inc.
Sangre de Cristo Electric Association, Inc.
Southeast Colorado Power Association
White River Electric Association, Inc.
Yampa Valley Electric Association, Inc.

By: */s/ Carol A. Curran*

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CERTIFICATE OF MAILING

I hereby certify that on this 25 day of July, 1988, I served the foregoing "Colorado-Ute Members Petition for Rehearing" by depositing a true and correct copy hereof in the United States Mail, postage prepaid, addressed as follows:

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